Supreme Court, U.S.
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No. 95-108

In The

Supreme Court of the United States

October Term, 1995

JON B. LINDEMAN,

Petitioner,

v.

CITY OF MIAMI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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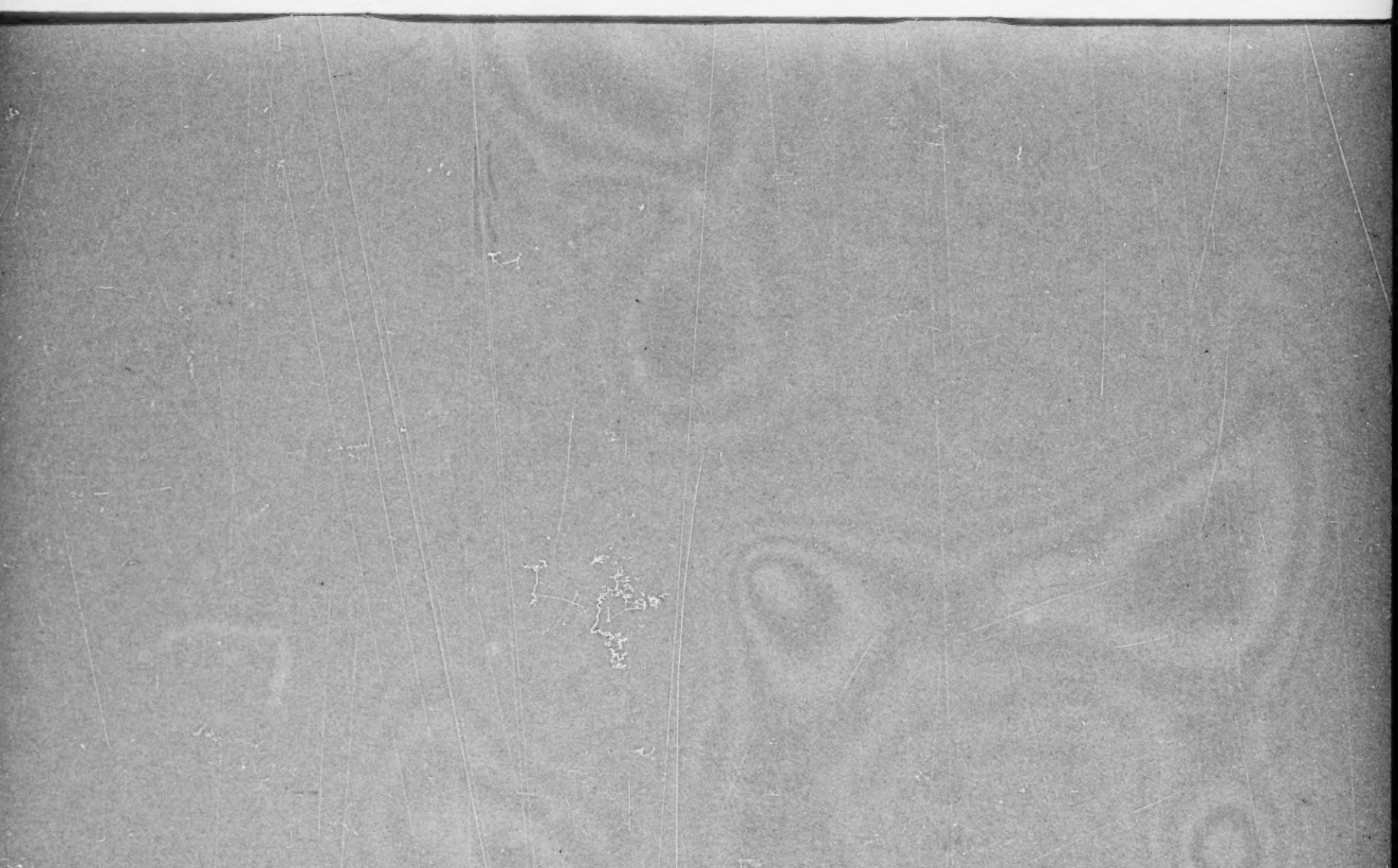

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STATEMENT OF THE CASE

At the risk of distracting from the central and important constitutional issues presented by this case, petitioner is constrained to advise the court as to the differences between the record in this case and the facts as presented by respondent.

The Brief in Opposition says at page 2 that when Jon Lindeman lost his employment with the City of Miami on May 23, 1988 his name was placed on a layoff register. This is contrary to the findings of fact by the U. S. District Court and the record in this case. The district court expressly found: "Lindeman's name was not placed on the layoff register in a timely manner." (R2-80-5). Joni Jones Harris, the city's senior personnel officer (R4-77), testified at the trial of this case that the City of Miami Civil Service Rule requiring that priority be given to persons placed on a layoff register in filling open positions was not followed in the instant case. (R4-84). The Miami Civil Service Commission found that the city had violated "Rule 12.1, Layoff Procedures" in the discharge of Lindeman in this case (Pl. Ex. 9 p. 2). The assertion at page 11 of the Brief in Opposition that "Petitioner was given notice of the layoff as required by the City of Miami Civil Service rules" is similarly incorrect and not supported by the record.

Page 2 of the Brief in Opposition indicates that Lindeman's name was placed on an eligible register and that the City of Miami located a job for him in the Parks and Recreation Department. No such eligible register was placed in evidence, no witness testified that Lindeman

was placed on such an eligible register and there is nothing in the record of this case to support the assertion that Lindeman's name was placed on such an eligible register. The actual testimony of how Lindeman obtained a job in the Parks and Recreation Department was:

> Well, a friend of Carlos was at a party where a former city attorney was also at, and happened to mention to this former city attorney that I had been laid off and what was the story.
>
> This former city attorney said to have me call her, which I did, and she in turn after hearing my story, she called the city manager.

(R4-55).

At page 2, the Brief in Opposition says that Lindeman "accepted a retirement incentive in 1994." The trial of this case was held in January 1993. Whatever occurred in 1994 is beyond and outside any record in this action. The fact that the City was able to force Lindeman out of his employment through use of the euphemistic "retirement incentive" is irrelevant to the issues before the court. The actual reality is that the "retirement incentive" agreement was entered into in April 1995.

The Brief in Opposition quotes from the City of Miami Civil Service Rule 14.3 to describe a process for review of employment decisions. Rule 14.3 is totally unrelated to the present case. Lindeman's employment was terminated in May 1988 (R2-80-3). In the summer of 1990, he first learned of City of Miami Study 88-46 (R4-57). It

was through the implementation of Study 88-46 that Lindeman's job was given to a probationary employee, Sylvia Zamora (R2-80-2 to 4). In the summer-fall of 1990, Lindeman commenced his civil service proceedings (R4-58) and these were "pursuant to Rule 16.2." (Pl. Ex. 9 p. 1). Rule 14.3, quoted from by the City, requires that "an appeal must be made in writing within fifteen days from the effective date of the [employment action]." (Pl. Ex. 7 p. 32). The City has taken the position in this case that "in grievance and abuse hearings brought by employees pursuant to Civil Services Rule 16 as in the instant case, the Civil Service Board acts in an advisory capacity." (Pl. Ex. 13 p. 8).

Contrary to the assertion in respondent's restated "Question Presented for Review," Lindeman was not given notice that his job had been given to a probationary employee nor the procedures through which his employment was terminated. The district court found: "At no time prior to his termination was Lindeman ever advised by any supervisor of the existence of Study 88-46." (R2-80-3).

Page 3 of the Brief in Opposition says: "A three-judge panel agreed with Petitioner, quashed the judgment entered by the City Manager, and ordered Respondent to follow the Civil Service Board's findings and recommendations." It says in the next paragraph: "As a result of the state proceeding, Petitioner received back pay, adjustments to his past and present salary and pension, adjustment to his title, and was otherwise made whole as a result of the wrongful layoff." The City's assertions in these regards are not supported by the record. The record shows that the three judge state court panel refused to

retain jurisdiction to enforce their decision (App. 20-21). Though the state court decision was rendered on March 9, 1992 (App. 17), there was no settlement of salary due Lindeman until one week before the trial in the district court case which began on January 20, 1993 (R5-271). There was no payment for either sick time or vacation time as the result of the state court proceedings (R5-271). There is no evidence in the trial record, or anywhere else in this case, concerning adjustments to pension. Concerning Lindeman's job title, there is no evidence in the record that Lindeman's job title was changed as the result of the state court proceedings. Lindeman returned to work in 1988 at the Department of Parks and Recreation in the position of principal staff analyst (R4-56) and was employed in that position at the time of the district court trial in January 1993 (R4-67). He never returned to the position of chief management analyst in the Management and Budget Department or the position of principal productivity analyst in the Office of Industrial Engineering.

There is nothing in the record of this case to support the contention by the City that Lindeman "was otherwise made whole" by the state court proceedings. It was in the district court proceeding that Lindeman was awarded $7,370.50 in lost vacation pay and lost sick pay and $25,000.00 incompensatory damages (R2-79-1). The assertion at page 12 of the Brief in Opposition that "Petitioner filed an action to review the City Manager's rejection in state court, where he prevailed and was made whole as the result of the wrongful layoff" is similarly incorrect and not supported by the record.

The City of Miami is correct in asserting that the district court has not entered a new judgment on remand.

It cannot be gainsaid, however, that the entry of a new judgment in favor of the City is a *pro forma* and purely ministerial act. The court of appeals granted a summary reversal of the district court's judgment and remanded with directions to enter a judgment consistent with an opinion which says that a public employee is not entitled to the protection of substantive due process of law when his employment is terminated. The logical extension of the City's argument would lead to an irrational result. Sup. Ct. R. 13.1 requires that a petition for a writ of certiorari be filed within 90 days after entry of judgment by the court of appeals. If a party had to await the entry by the district court of a *pro forma* judgment on remand, his right to seek review in the U. S. Supreme Court could be defeated merely by the district court waiting more than 90 days to enter that judgment.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The City of Miami asserts that because the decision of the court of appeals consists of two sentences, it cannot conflict with decisions of other courts of appeals or with decisions of this Court nor can it involve important questions of federal law. The City confuses the term "decision" with the "opinion" of a court of appeals. As set out in *Black's Law Dictionary* 407 (6th ed. 1990): " 'Decision' is not necessarily synonymous with 'opinion'. A decision of the court is its judgment; the opinion is the reasons given for the judgment, or the expression of the views of the judge. But the two words are sometimes used interchangeably."

A conflict between decisions as used in Sup. Ct. R. 10 "means that there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or the general principles utilized." Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth E. Geller, *Supreme Court Practice* § 4.3 at 167 (7th ed. 1993) (footnote omitted). The decision in the instant case presents a real conflict on the same matter of law when compared with decisions of other circuits: some circuits hold that a public employee is entitled to the protection of substantive due process of law and some do not.

An important question of federal law, as used in Rule 10, means a problem beyond the academic, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955), which involves principles the settlement of which are important to the public. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Not only does the present case involve basic constitutional rights that are important to millions of public employees, it involves principles which are also important to their employers, the general public. The fact that the determination of those rights and principles were expressed in a two sentence opinion does not undo the reality that basic rights affecting millions of people are being determined or diminish the importance of those rights and principles to the general public.

Decision in Conflict with a Decision of Another United States Court of Appeals on the Same Matter

Conspicuous by its absence from the Brief in Opposition is any assertion that the decisions from courts of appeals cited in the Petition for Writ of Certiorari are not in conflict with the decision by the court of appeals in the

present case other than the discussion of *Newman v. Massachusetts*, 884 F. 2d 19 (1st Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990) (Newman I), and *Newman v. Burgin*, 930 F. 2d 955 (1st Cir. 1991) (Newman II). The City of Miami relies on *Newman II* to overcome the conflict between *Newman I* and the decision below in the present case. *Newman I* discusses the principles of substantive due process. 884 F. 2d at 24-26. *Newman II* in no way says that it is overruling the decision in *Newman I*. *Newman II* discusses procedural due process and the portion of the opinion quoted in the Brief in Opposition concerns solely procedural due process and not substantive due process. In context, the portion of *Newman II* quoted says that the procedures followed by the University of Massachusetts met the minimum standards the Constitution requires, the standards set forth in the University's "Red Book" were greater than the Constitution requires, and the failure to meet the "Red Book" standards is a matter of University rule or policy and not federal constitutional law. The discussion of procedural due process in *Newman II* has no relation to the issues presented by the instant case.

The Brief in Opposition attempts to dismiss the lack of uniformity among the various courts of appeals by ascribing it to interpretation of state laws and the property rights created by particular state laws. Respondent misses the point. In the present case, and in the decisions of the courts of appeals described in the Petition for Writ of Certiorari, each court determined that the public employee had a property interest in his or her job. The issue presented by those cases was beyond consideration of state law and whether a property right in employment existed. The issue in all of those cases, and in the present

case, involved the construction of the U.S. Constitution and whether, given the existence of a property right, it was protected against arbitrary government action.

Decision in Conflict with Applicable Decisions of this Court

The City of Miami, at page 7 of its brief, cites *Bishop v. Wood*, 426 U.S. 341 (1972), for the proposition that employment law is an area of the law which remains outside the scope of substantive due process jurisprudence. That is not the holding of *Bishop v. Wood*. In *Bishop*, the district court ruled that the municipal employee did not have a property interest in his job and "held his position at the will and pleasure of the city." 426 U.S. at 345. This construction of North Carolina law was upheld by the Court of Appeals for the Fourth Circuit and was the foundation of the decision by this Court. *Id.* at 346-47. Without a property interest in his job, Bishop had nothing to be protected by the Fourteenth Amendment. Unlike *Bishop*, the district court in the present case found that Jon Lindeman did have a property interest in his job (R2-80-7) and that property interest is entitled to some protection by the Due Process Clause of the Fourteenth Amendment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). The *Loudermill* opinion says at its pertinent part: "Respondents' federal constitutional claim depends on their having a property right in continued employment [citations omitted]. If they did, the State could not deprive them of this property right without due process." 470 U.S. at 538 (footnote omitted).

The portion of *Cafeteria and Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 898 (1961), quoted in the Brief in Opposition supports the position of petitioner, Job Lindeman, that the decision below in the present case conflicts with prior decisions of this Court. The bedrock of substantive due process is that governments may not take actions which are arbitrary and deprive a person of a property right. In the *McElroy* case, the worker who had lost her job as the result of being determined a security risk was Rachel Brawner. In the decision, the Court said: "We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory. . . . " 367 U.S. at 898. If substantive due process did not protect against arbitrary acts of government that deprived people of property interests in their jobs, no such assumption could have been made.

Respectfully submitted,

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